BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY L. WOLF	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,893
CALENDAR CLUB	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY UNKNOWN	)	
Insurance Carrier	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Robert H. Foerschler dated April 28, 1999. The Administrative Law Judge granted claimant benefits under the Workers Compensation Act, finding that respondent did not qualify for the $20,000 payroll exclusion set forth in K.S.A. 1998 Supp. 44-505(a).

ISSUES

Did respondent establish, by a preponderance of the credible evidence, that it had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees, and/or did respondent establish that it had a total gross annual payroll for the current calendar year of not more than $20,000 for all employees, not including family members?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

Claimant suffered accidental injury while working for respondent's Oak Park Mall calendar business in Overland Park, Kansas, on December 1, 1998.

The Appeals Board will first consider whether it has jurisdiction under K.S.A. 1998 Supp. 44-551 and K.S.A. 1998 Supp. 44-534a to consider this appeal. Respondent argues, and the Appeals Board agrees, that the issue dealing with respondent's total gross salary does constitute a jurisdictional defense under K.S.A. 1998 Supp. 44-534a(a)(2), as it goes directly to the compensability of claimant's injury and claim. *See* Ghramm v. Emporia Construction & Remodeling, Docket No. 199,776 (January 1996).

K.S.A. 1998 Supp. 44-505(a) states in part that the Workers Compensation Act shall not apply to:

> (2) [A]ny employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection . . . .

Claimant was hired by respondent company, Calendar Club of Kansas City, to work in its Oak Park Mall location. The total salary paid from Calendar Club of Kansas City, owned by respondent, Larry Dobbs, and his partner, Tom Lassley, computed to $12,187. Mr. Dobbs also owns Calendar Club of Larry R. Dobbs of Wichita, which performs the identical function in Wichita, Kansas, as that performed in Kansas City. The total payroll for 1998, including contract labor in Wichita, computed to $35,127. However, of that amount, $15,212 was paid to the members of Mr. Dobbs' family. Therefore, the non-family payroll for Calendar Club of Larry R. Dobbs of Wichita totals $19,915.

Respondent argues that the Kansas City Calendar Club and the Wichita Calendar Club are separate entities, and the total payroll for each cannot be combined for the purposes of K.S.A. 1998 Supp. 44-505.

The Administrative Law Judge agreed and refused to combine the two business entities. However, the Administrative Law Judge considered the fact that Calendar Club of Kansas City began its operation November 21, 1998, and paid $12,187 in payroll through December 31, 1998. Testimony verified that a normal operation would run for four months of each year. The Administrative Law Judge, in considering that fact, found that, if a six-week payroll paid over $12,000 in wages, a full four-month season of operation would be expected to exceed $20,000 in payroll. Benefits were, therefore, granted to claimant.

However, K.S.A. 1998 Supp. 44-505 requires that the employer's total gross annual payroll for the preceding calendar year not exceed $20,000. Respondent, in this case, did not submit evidence of salary paid in 1997. In fact, the Kansas City company did not begin operation under respondent until November 21, 1998, and the salary records of its predecessor are not in the record, even if the Board were inclined to consider same.

In addition, the statute requires that a reasonable estimate of the employer's current calendar year salary be made. The current calendar year salary does not have to be estimated, as it can be verified at $12,187 for the Kansas City operation. The Administrative Law Judge's speculation regarding what a full four-month operation would pay is inappropriate, as it is not based upon evidence, but speculation. Therefore, this finding is reversed by the Appeals Board.

Claimant also argues that the Wichita and Kansas City payroll should be combined, as both entities are run in the same fashion, by the same person, performing the same job. The only distinction between Wichita and Kansas City is that, in Kansas City, respondent has a partner who shares in the profits, and in Wichita, respondent is a sole proprietor, employing certain family employees who are paid wages through the operation of the company.

Respondent argues that the entities are separate as they file separate Schedule Cs with the Internal Revenue Service. However, a review of the Schedule Cs verifies that, while they have slightly different names, they are both owned by Larry Dobbs, at least in part, and utilize the identical employer identification number.

K.S.A. 1998 Supp. 44-505 requires that the total gross annual payroll for the employer be for "all employees." The Appeals Board finds, in this instance, that the employer is Calendar Club as owned by respondent, Larry Dobbs. This includes both the Wichita and Kansas City operations. The Appeals Board, therefore, finds that the salary totals from the Wichita operation and from the Overland Park operation are to be included for the purposes of K.S.A. 1998 Supp. 44-505. Therefore, the Appeals Board finds that respondent has exceeded the limitations set forth in the statute, and the Workers Compensation Act shall apply to this injury. The Order of the Administrative Law Judge finding the Act applies, although for different reasons, is affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Robert H. Foerschler dated April 28, 1999, should be, and is hereby, affirmed, and the exemption requested by respondent under K.S.A. 1998 Supp. 44-505 should be, and is hereby, denied.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Mark J. Hoffmeister, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director